NO. 46549-3-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

VALERIE AND STEVEN ANDERSON,

Plaintiff-Appellant,

v.

MASON COUNTY,

Defendant-Respondent.

On Appeal from Mason County Superior Court
Cause No. 13-2-00095-8

RESPONDENT'S BRIEF

John E. Justice, WSBA No. 23042
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January 13, 2015

TABLE OF CONTENTS

Cases

Other Authorities

Rules

I. IDENTITY OF RESPONDENT/CROSS-APPELLANT

Mason County is the Respondent.

II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

A. Does the statute of repose preclude plaintiffs' claims against Mason County because they did not accrue within six years of the completion of the construction project plaintiffs' claim caused their damages? (Appellant's Assignment of Error No. 1)

B. Does work done by Mason County in a different location from where plaintiff was injured negate the operation of the statute of repose. (Appellant's Assignment Error No. 1)

III. COUNTER-STATEMENT OF THE CASE

A. Factual Background.

In February, 2010, the appellant, Valerie Anderson, reported that she witnessed a hole develop in her driveway, a residence in the Allyn View Mobile Home Park. CP 82. It was repaired, allegedly by a Mason County employee. *Id.* That hole did not re-appear after being repaired. CP 134.

On February 4, 2011, the appellant allegedly tripped or fell into a hole adjacent to her storage shed. CP 153. Appellant alleged in her complaint that the hole developed as a result of work by Mason County "to fill and cap" septic systems in the mobile home park in 2000-2001.

CP 192. This hole was at a *different location* than the 2010 hole. CP 77 & 134. There is no allegation that the appellant's damages were caused by the 2010 hole, or its repair.

The appellants' complaint asserted a negligence claim against Mason County. CP 192.

B. Procedural Background.

Mason County moved for summary judgment on the appellants' negligence claim. CP 191. The trial court granted the motion. CP 70-71. This appeal followed. CP 5-7.

IV. ARGUMENT

A. Standard of Review.

In reviewing the grant of summary judgment "the appellate court engages in the same inquiry as the trial court." *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 866 P.2d 1272 (1994).

The purpose of summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). Summary judgment should be granted if it appears from the record that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon

which the outcome of the litigation depends. *Hudesman*, 73 Wn.2d at 886.

The party moving for summary judgment has the burden of establishing the absence of any issue of material fact. *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 854, 751 P.2d 854 (1988). However, once the moving party has presented competent summary judgment proof, the non-moving party may not rest on mere allegations in its pleadings, but must respond by affidavit or other proper method setting forth specific facts showing there is a genuine issue for trial. *McGough v. Edmonds*, 1 Wn. App. 164, 168, 460 P.2d 302 (1969). Broad generalizations and vague conclusions set forth in an affidavit in opposition to a motion for summary judgment are insufficient to successfully resist the motion. *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977).

Summary judgment does not alter the applicable burden of proof; a moving party need not disprove an essential element of the nonmoving party's case, and may merely point out for the court the absence of any essential element. *Young v. Key Pharmaceuticals*, 112 Wn. 2d 216, 225-27, 770 P.2d 182 (1989).

Finally, "an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is

supported by the record and is within the pleadings and proof." *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061, 1064 (2003), *citing, Int'l Bhd. of Elec. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000); and *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

B. The Statute of Repose Bars this Claim Against Mason County.

Pursuant to RCW 4.16.310:

> All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only **during the period within six years after substantial completion of construction**, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: PROVIDED, That this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues. The limitations prescribed in this section apply to all claims or causes of action as set forth in RCW 4.16.300 brought in the name or for the benefit of the state which are made or commenced after June 11, 1986. (emphasis added)

The statute of limitation and the statute of repose together create a two-step analysis for computing the limitation period for a tort action arising from improvements on real property. First, the cause of action must accrue within six years of substantial completion of construction. Second, suit must be filed within the applicable statute of limitation. *Del Guzzi Constr. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 883, 719 P.2d 120 (1986).

In this case, the appellants' claim against Mason County arises out of an alleged conversion of a septic system to a sewer system by the County. The statute of repose applies to claims for constructing, altering, or repairing "any improvement upon real property" or "administration of construction contract for any construction, alteration, or repair of any improvement upon real property." RCW 4.16.300. The alleged act of abandoning a septic system by filling and capping it, falls within the broad scope of the statute. *See, e.g., Washington Natural Gas Co. v. Tyee Const. Co.*, 26 Wash. App. 235, 611 P.2d 1378 (1980) (installation of underground power line subject to statute because it "adds to the value of the property, is an amelioration of its condition, and enhances its use.") The conversion of a septic system to a sewer system "adds value" to the

property, ameliorates a condition and enhances the use of the property. It clearly falls within the statute's broad reach. *See, Wilhelm v. Houston County*, 310 Ga.App. 506, 713 S.E.2d 660 (1974) (installation of septic system held to be an "improvement to real property" under Georgia's statute of repose.)

The statute of repose applies to claims for personal injury. *Pinneo v. Stevens Pass, Inc.*, 14 Wash. App. 848, 545 P.2d 1207 (1984). The work allegedly done by Mason County was completed in 2000. *Appellants' Brief*, pg. 2. The statute of repose therefore required that any cause or action for personal injury arising out of this activity must have accrued by 2006 at the latest. Appellants' cause of action did not accrue until *February 4, 2011* and thus the statute of repose bars their claim.

C. Neither the Discovery Rule nor Repairs Completed in 2010 Alter the Affect of the Statute of Repose.

The appellants concede that the statute of repose is generally applicable to the construction project that was completed at the Allyn View Mobile Home Park in 2000 or 2001. It is undisputed that their cause of action did not accrue within six years of the completion of that project. However, they argue, incorrectly, that the "discovery rule" applies and extends the statute of repose beyond six years. The statute of repose,

however, is unaffected by the discovery rule. Alternatively, they claim that repair work allegedly done by Mason County at a *different location* in 2010 somehow negates the effect of the statute of repose. No case is cited for this position. Logically it also fails because the appellants are suing not for the work Mason County allegedly did in 2010, but for work it allegedly did in 2000 or 2001.

1. The Discovery Rule Does Not Delay the Expiration of the Statute of Repose.

Statutes of repose establish a period of time within which a cause of action must accrue (and from which date any applicable statute of limitation will begin to run). *Jones v. Weyerhaeuser Co.*, 48 Wn. App. 894, 898, 741 P.2d 75 (1987); *Del Guzzi Constr. Co., Inc. v. Global Northwest Ltd*, 105 Wn.2d 878, 883-84, 719 P.2d 120 (1986); *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 192 n.8, 69 P.3d 895 (2003). The statute of repose, codified in RCW 4.16.310, establishes an accrual period for any claims arising from or related to the design or construction of improvements to real property. It provides that the cause of action must have accrued within six years following substantial completion of construction or termination of the services giving rise to the claim, whichever is later. RCW 4.16.310. If the claim has not accrued

within this six-year period, the claim is barred. *Id.*

Critical to a proper understanding of statutes of repose is an understanding of their relationship to the judicially created "discovery rule." Under the discovery rule, certain causes of action for negligence or professional malpractice are deemed not to accrue until the plaintiff discovers, or in the exercise of reasonable diligence should discover, the facts giving rise to the claim. *See, e.g., Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969); *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 760 P.2d 348 (1988). In RCW 4.16.310, the state legislature recognized that application of the discovery rule to claims involving improvements to real property conceivably could delay the accrual of a claim (and thus the running of the applicable statute of limitation) for many years following completion of construction, until the hidden defect came to light. Thus, the legislature designed the construction statute of repose to limit the time within which a claim *had to accrue in order to be cognizable*. In other words, "[t]he discovery rule is limited by RCW 4.16.310 which fixes a precise time beyond which no remedy will be available." *Gevaart*, 111 Wn.2d at 502.

In contrast to statutes of repose, statutes of limitation establish a

period of time *after accrual* within which the action must be filed or commenced. *See* RCW 4.16.050 ("Except as otherwise provided in this chapter ... actions can only be commenced within the periods provided in this chapter after the cause of action has accrued."); *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975) ("Statutes of limitation do not begin to run until a cause of action has 'accrued.' "). Statutes of limitation vary depending on the type of claim. For example, tort actions must be filed within three years of accrual, while contract actions must be filed within six years of accrual. RCW 4.16.080(2) (tort); RCW 4.16.040(1) (written contract).

The Washington Court of Appeals has explained the difference between the construction statute of repose and the statute of limitation as follows:

> [RCW 4.16.310] is not truly a statute of limitation in the normal sense of the term. It provides an absolute bar to the commencement of any action which has not accrued within 6 years of substantial completion of construction. As such, it provides a time period in which a cause of action must accrue-not a time period from accrual to commencement of the action. Thus, it is more properly designated as a "statute of abrogation," or a "statute of repose."

Jones, 48 Wn. App. at 8982.

Appellants muddle the distinction between RCW 4.16.310--the

construction statute of repose--and statutes of limitation that generally apply to tort claims. "A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specified time, *even if the injury has not yet occurred.*" *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211-12, 875 P.2d 1213 (1994) (emphasis added). The discovery rule may delay the accrual date within the statute of repose, but it **does not** extend the expiration of the statute of repose. *See, e.g., Hudesman v. Meriwether Leachman Associates, Inc.*, 35 Wn. App. 318, 321-22, 666 P.2d 937 (1983), *rev. denied*, 100 Wn.2d 1030 (1983) ("RCW 4.16.310 legislatively restricts the application of the discovery rule.") This point was made crystal clear in a case cited by appellants, *1000 Virginia Ltd. P'Ship v. Vertecs*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006):

> To illustrate the effect of the statute of repose, if, for example, a negligence claim against a contractor arising out of the construction of a building does not accrue until seven years after substantial completion, **it is barred by RCW 4.16.310 because it did not accrue within the six-year period of the statute of repose**. On the other hand, if the negligence action accrues five years after substantial completion of construction of a building, and therefore the claim is not barred by the statute of repose, the claim then must be brought within the limitations period for a

> negligence claim—generally within three years of accrual of the cause of action—and the action therefore would have to be brought before the end of eight years after substantial completion.

In this case, there is no dispute that the construction involving the conversion of the septic system to a sewer was completed in 2000. Under RCW 4.16.310, any cause of action related to that construction had to accrue within six years, i.e. by 2006 at the latest, or be barred. This claim did not accrue until 2011. As the Court reiterated in *1000 Virginia Ltd.*, "RCW 4.16.310 requires a 2–step analysis for computing the accrual of a cause of action arising from the construction, alteration, or repair of any improvement to real property. First, the cause of action must accrue within 6 years of substantial completion of the improvement; and second, a party then must file suit within the applicable statute of limitation, depending on the type of action." 158 Wn.2d at 575, *quoting*, *Del Guzzi Constr. Co. v. Global NW., Ltd.*, 105 Wn.2d 878, 883, 719 P.2d 120 (1986). *See, also, Hudesman, supra*, 35 Wn. App. at 322 ("In essence, RCW 4.16.310 sets an outer limit for discovery of an erroneous survey giving rise to a cause of action described in RCW 4.16.300, for the accrual of a claim for damages and for the commencement of the running of the period of the statute of limitations applicable to such claims.") Here, it is

undisputed that appellants' cause of action against Mason County did not *accrue* within the six year statute of repose and thus summary judgment was properly granted.

2. The Work Allegedly Done by Mason County in 2010 does not Re-Set the Statute of Repose.

In February, 2010, the appellant reported that she witnessed a hole in her driveway. CP 82. It was later repaired, allegedly by a Mason County employee. *Id.* Appellant has not had any problems with the 2010 hole since it was repaired. CP 134. In February of 2011, the appellant allegedly stepped into a hole at a completely *different location* than the 2010 hole that was repaired and never re-appeared. CP 77 & 134. There is no allegation that the appellant's damages were caused by the 2010 hole, or its repair.

RCW 4.16.310 provides that:

> All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after **substantial completion of construction**, or during the period within **six years after the termination of the services** enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. (Emphasis added)

There is no dispute that the septic to sewer conversion was "substantially complete" in 2000. The damages alleged by appellant arise from the original work done in 2000, not the repair work allegedly done in 2010.

The appellants argue that the statute of repose applies to "repairs" and thus the 2010 repair work triggers a new statute of repose period. Even if that were true, the repair work allegedly done in 2010 did not cause the appellants' damages and they do not allege that work was defective. As Mrs. Anderson testified in deposition:

> Q. Did that area [of the 2010 holes] ever settle any more or was it fine after it was filled in?
>
> A. We haven't had any problems with it.

CP 134.

Appellants argue that the County knew that the 2010 holes were related to the septic to sewer conversion. The appellants citation in support of this statement, CP 61, is a cover page for exhibit 13 to the Declaration of Barbara Bradshaw. Paragraph 9 of that declaration, which may be what appellants are referring to, does not support the statement either. CP 27. There is also no evidence in the record that the 2010 holes

or the 2011 holes were caused by the decommissioning of septic tanks or that the decommissioning was in any way improper. There is also no evidence in the record that the 2010 holes were caused by the same mechanism as the 2011 holes or that they were in any way connected. Appellants refer to a "schematic map" that they contend proves Mason County knew the holes filled in 2010 were part of a larger field. Again, the citation to the record, CP 166, does not support this statement.

Second, no authority is cited for the proposition that a gratuitous repair of one hole by the County in 2010 creates liability for damages caused by a completely different hole that appeared over 10 years after substantial completion of the underlying construction project. Any cause of action related to the "septic to sewer project" had to accrue by 2006 at the latest. It didn't. No case from Washington has held that a subsequent repair by a contractor at one location, after the statute of repose has expired, restarts the statute of repose for the *entire* project. Cases from other states have specifically rejected such an argument. *See, e.g., Long v. Moore*, 183 N.C. App. 155, 643 S.E.2d 678 (2007) ("Repair or other attempted remedial action subsequent to substantial completion does not toll the statute of repose or start it running anew.")

V. CONCLUSION

For the foregoing reasons, the summary judgment in favor of Mason County should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of January, 2015.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

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CERTIFICATE OF SERVICE

I certify that I caused to be mailed a copy of the **BRIEF OF RESPONDENT**, on this 13th day of January, 2015, to the following counsel of record:

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DATED this 13th day of January, 2015 at Tumwater, Washington.

Marry Marze